

**EXHIBIT D**

**Drumming Declaration**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 11
	)	
W. R. GRACE & CO., et al., <sup>1</sup>	)	Case No. 01-01139 (KJC)
	)	(Jointly Administered)
Reorganized Debtors.	)	
	)	
	)	

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**THE DECLARATION OF DAVID DRUMMING, JR., IN SUPPORT OF THE  
REORGANIZED DEBTORS' OMNIBUS MEMORANDUM IN: (A) REPLY IN  
SUPPORT OF THE REORGANIZED DEBTORS' MOTION FOR SUMMARY  
JUDGMENT PURSUANT TO FED. R. BANKR. P. 7056 FOR PARTIAL  
DISALLOWANCE OF CLAIM NO. 7021, FILED BY NORFOLK SOUTHERN  
RAILWAY; (B) RESPONSE TO CROSS-MOTION FOR SUMMARY JUDGMENT  
ALLOWING CLAIM NO. 7021; AND (C) SUPPORT OF AN ORDER FINDING THE  
FELA ACTION TRIAL RECORD INADMISSIBLE FOR THE PURPOSE OF  
NORFOLK SOUTHERN ESTABLISHING ITS INDEMNIFICATION CLAIM**

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COUNTY OF AIKEN	)	
	)	ss.
STATE OF SOUTH CAROLINA	)	

David Drumming, Jr., deposes and says:

1. I am over the age of 18 and competent to testify to those subjects discussed in this Declaration. In June 1989, I commenced my employment at the Grace kaolin products plant, located at 213 Kaolin Road, Aiken, SC 29801 (the "Grace Plant"). I worked from 1989 until approximately 1995 as a utility operator. One of my primary tasks was moving railcars and setting and releasing railcar handbrakes. I am highly familiar with the task—and how to perform it safely. Another task was loading railcars. I am highly familiar with the task—and how to perform it safely, having performed it over many years. In the late 1990's, I was a miller. In the 2000's, I was a working leader. I am presently the safety coordinator and acting plant foreman at the Grace Plant. In my capacity as safety coordinator and acting plant foreman, I periodically

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<sup>1</sup> The Reorganized Debtors comprise W. R. Grace & Co. ("Grace") and W. R. Grace & Co.-Conn. ("Grace-Conn.").

speak (and have done so for many years) with others in the kaolin mining and processing industry, and I understand from such communications that the Grace Plant enjoys an excellent reputation in the industry for safety, cleanliness and quality of product. In my capacity as safety coordinator and acting plant foreman, because of my job duties, I am highly familiar with the history and safety experience of the Grace Plant.

2. All facts set forth in this Declaration are based on one or more of my personal knowledge which was formed by my personal experience and by information supplied to me in the ordinary performance of my duties by employees of and/or professionals retained by the Reorganized Debtors in these chapter 11 cases, and my experience and knowledge of Grace's businesses, particularly that of the Grace Plant. If called upon to testify, I could and would testify competently to the facts and opinions contained herein. This declaration is filed in support of the Omnibus Memorandum.

3. I am familiar with and have personally reviewed the various agreements between Norfolk Southern and Grace, including the Right-of-Way Agreement, the Operating Agreement, the 1983 Supplemental Agreement and the 1990 Supplemental Agreement, copies of which are attached to Norfolk Southern's proof of claim.

4. Based on my years working at Grace, I know that kaolin has been mined and processed at the Grace Plant since the 1940's. Kaolin is soft, white clay that is an essential ingredient in the manufacture of china and porcelain and is widely used in the making of paper, rubber, paint, and many other products. During my 28 years working at the Grace Plant, Norfolk Southern routinely delivered empty railcars to the Grace Plant. In my experience in 1998, and I witnessed in 1998, Grace employees fill the cars with kaolin at the Grace Plant and Grace consign filled railcars to Norfolk Southern. Grace consigned filled railcars to Norfolk Southern

so they could transport the railcars to transshipment points, where they are attached to long-haul trains for transshipment to Grace plants in Lake Charles, Louisiana, and Valleyfield, Quebec. In January 1998, Grace mined and processed non-specialty kaolin in sufficient quantity to fill approximately 50-60 railcars per month. A loading chute (the "Main Loading Chute") was used to load the railcars. The Main Loading Chute was in operation when I began working at Grace, I worked with the Main Loading Chute when I loaded cars, and I continue to work with the Main Loading Chute in my present duties. The Main Loading Chute itself is not mentioned in the Right-of-Way Agreement or the Operating Agreement. The Main Loading Chute is located near the "shed" described in Drawing no. TB-80-0185, which is attached to the Right-of-Way Agreement.

5. In my 28 years of experience working at the Grace Plant, Grace never shipped bulk kaolin by rail in a crushed clay or liquid slurry form. Grace has only ever shipped bulk kaolin by rail in powder form. When wet, powdered kaolin may become slippery, particularly on flat surfaces. In my experience working with kaolin at the Grace Plant, when kaolin dries on a surface, it cakes and forms a non-slippery film that is difficult to remove. It is extremely difficult, if not impossible, to tell from a picture whether kaolin on a surface is wet (and thus slippery) or dried into a non-slippery film. Based upon my experience as safety coordinator and having working for nearly 28 years at the Grace Plant, I know that the risks attendant to the mining, manufacture and shipping of kaolin are well-known throughout the industry. At Grace, we instruct people about safety every day. One important safety concern at the Grace Plant has always been ensuring that Grace employees had proper safety footwear, gloves, eyewear and hardhats. In particular, steel-toed boots with safety soles were required. As a matter of routine, visitors are briefed on taking due care in the mining, manufacturing and shipping areas of the

Grace Plant and they are issued hard hats and safety glasses. To the best of my knowledge, and in part based on what I learned in safety coordinator, there has not been a single reportable incident involving injury from slipping on wet kaolin at the Grace Plant since I began working at the plant in 1989.

6. The Grace Plant is regulated by the United States Mine Safety and Health Administration (“MSHA”), which is part of the Department of Labor. MSHA inspects the Grace Plant semi-annually for health and safety compliance. Railcar safety is within the scope of MSHA inspections, and MSHA could, and would, issue citations for railcar loading and handling safety violations. As safety coordinator for the past seven years, I have been the Grace Plant’s main point-of-contact with MSHA. In my 28 years of experience at the Grace Plant, the last seven as the plant’s safety coordinator, MSHA has never assessed the Grace Plant, to the best of my knowledge, for any railcar handling and loading safety violations. The Grace Plant has enjoyed an excellent reputation with MSHA for safety and health compliance for many years.

7. I am familiar with the covered, immobile, overhead loading structure with a spout described in the 1990 Supplemental Agreement (the “Specialty Product Loading Chute”). As a utility operator and working leader, I have personally operated the Specialty Product Loading Chute. The Specialty Product Loading Chute is shown in Drawing No. AD-0102, which is annexed to and made a part of the 1990 Supplemental Agreement. From 1992 until approximately 2001, the Specialty Product Loading Chute was used solely to fill approximately three railcars per month with a specialty kaolin product known as NKC, although the number of railcars loaded per month could vary considerably, depending upon customer demand. NKC was manufactured and shipped in a powder form. In approximately 2001, Grace discontinued

manufacturing NKC, and discontinued using the Specialty Product Loading Chute for that purpose. The Specialty Product Loading Chute went unused for several years.

8. Because of my work at the Grace Plant in the 1990s I am personally familiar with the fact that in the 1990's, Norfolk Southern delivered railcars to the Grace Plant two or three times a week to be filled at either the Main Loading Chute or at the Specialty Product Loading Chute. In the 1990s, I was one of the Grace employees who inspected railcars prior to loading them with kaolin. Upon delivery, the railcars were supposed to be in good mechanical condition, clean on the interior and exterior and free of leaks. Grace employees inspected each railcar at the time of delivery by Norfolk Southern. Prior to loading the railcars using either the Main Loading Chute or the Specialty Product Loading Chute, as part of the standard railcar inspection, Grace personnel cleaned the cars by opening the cleanout doors in the bottom of the railcars and manually removing leftover kaolin and other debris from the railcars with brooms and shovels.

9. In my experience working directly with railcars at the Grace Plant, railcars delivered to the Grace Plant by Norfolk Southern during the 1990s were often in generally poor condition. The railcar exteriors were almost always encrusted on the flat surfaces with dried and caked kaolin deposited from often years of prior use. I estimate based upon my experience that, in 1998, up to approximately 10% of the railcars delivered by Norfolk Southern to the Grace Plant were rejected due to material or mechanical deficiencies such as faulty brakes (such as brake shoes not coming into proper contact with the wheels) faulty handbrake and quick release mechanisms and cleanout doors that did not open, or if opened, could not be closed properly. Very often, Norfolk Southern's railcars, when loaded and consigned to Norfolk Southern leaked kaolin from various seams and corners. Grace employees attempted to seal those leaks so that product would not be lost. Despite such efforts, many railcars would still leak such that a plume

of kaolin would billow from the railcar when in transit in a Norfolk Southern-controlled and – operated train. I personally witnessed such leaky railcars many times.

10. In my experience working at the Grace Plant in the 1990s, I witnessed that once railcars had been delivered to the Grace Plant, Grace employees used a “trackmobile” to move railcars around the Grace Plant siding and to position the railcars for loading. Moving the railcars required Grace employees to set and release railcar handbrakes on multiple occasions, whether by the quick release mechanism, or when that mechanism did not function properly (as was often the case) by the handbrake wheel. Grace employees always chocked the railcar wheels as an additional safety measure.

11. When I was a utility operator and then later as a working leader, I routinely set and released handbrakes on Norfolk Southern railcars. In 1998, I always had a safety belt attached to a railing when I worked with the handbrakes on a railcar. I always stood on the grating platform at the brake end of the railcar, where the handbrake was located. I never attempted to release or set a railcar handbrake while standing on the ladder or with one foot on the ladder and the other on the platform. Occasionally in my experience working with the railcars, a utility operator could not release a handbrake by himself. In such a circumstance, a second employee would mount the railcar to assist in releasing the handbrake. That employee would also have his safety belt secured while on the railcar. In my approximately 28 years of experience working at the Grace Plant, the last seven of which I have been the plant’s safety coordinator, I am not aware of a single reportable incident involving a Grace employee or a Norfolk Southern employee slipping and injuring him or herself as a result of setting and releasing handbrakes on railcars while those cars were located at the Grace Plant.

12. In my experience in personally working on railcars at the Grace Plant and in observing other Grace employees and Norfolk Southern employees work on railcars, there is no functional difference between what Grace employees do and what Norfolk Southern employees do in setting and releasing railcar handbrakes. To the best of my knowledge and based on my personal observation of Norfolk Southern employees working when they were at the Grace Plant picking up railcars, in 1998 Norfolk Southern employees did not routinely wear safety belts when climbing onto a railcar platform to set or release a handbrake. Also in my experience, I have occasionally seen Norfolk Southern employees stand with one or both feet on the railcar coupling or on the coupling breaker, attempting to release or set a handbrake. I have also seen Norfolk Southern employees attempt to set or release a railcar handbrake while standing on the ground. Based upon my 28 years of experience working with railcars, and based on my experience as safety coordinator, these are all unsafe ways to set or release a handbrake, particularly without a safety belt. If I as safety coordinator were to observe a Grace employee setting or releasing a handbrake in such an unsafe manner, I would immediately correct the employee.

13. Based on my experience working at the Grace Plant, Grace in 1998 loaded approximately 50-60 railcars per month using the Main Loading Chute. Approximately five cars can be positioned in the shed at the Main Loading Chute at any one time. Up to 12-13 cars could be stored at the plant at any one time, including on the siding. I know from having worked with the loading process, Grace employees moved each railcar under the spout at the Main Loading Chute. Each railcar had three compartments, which were filled individually. A Grace employee, usually the utility operator (or occasionally, the working leader, when the workload was heavy) climbed onto the top of the railcar to open the loading doors. At all times when climbing on the



top of the railcars in 1998, Grace employees connected themselves by safety belt to the permanently installed lifeline. They also wore hardhats, safety eyewear and proper shoes at all times on the job. The utility operator would open the spout to fill the compartment. There was an alarm to warn that a railcar compartment is filled when the level is approximately 3-4 inches from the top. When one compartment is filled, then the utility operator climbs on the railcar to close the drop chute for that compartment and open the drop chute for the next compartment. When all three compartments are filled, the utility operator will climb onto the railcar, close the loading doors and attach seals to them. The operator will also attach seals to each other access point, including the cleanout doors. Once a car has been sealed, no one from outside the plant can tell you how the car has been filled. I should note, I have worked as a utility operator so I have personally performed all of the tasks described in this paragraph.

14. Based on my experience working as a utility operator and based on my experience in other jobs at the Grace Plant including being a working leader, I have witnessed that in the 1990's, kaolin would occasionally overrun from a compartment and spill on the top of the railcar. This does not mean that a railcar was "overfilled." There is no way to easily determine whether a railcar has been overfilled short of weighing it. Also, there is no way to determine whether a railcar is filled with kaolin or empty once the loading doors have been closed and sealed. When kaolin spilled on the railcar, the utility operator always cleaned off the railcar using a high-pressure air hose, both on the top of the car and the sides and flat climbing surfaces. This cleaning method was generally effective because the railcars were under cover while they were being filled, such that even in bad weather the cars were generally dry. That said, a blow down could not clear dried and caked kaolin on the cars present when the cars were delivered by Norfolk Southern. If necessary, a utility operator or working leader would also use a broom to

clear kaolin dust from the railcar. In my experience, including my experience as a working leader and utility operator, Grace utility operators and working leaders as a matter of long-standing practice did not position filled railcars on the siding for Norfolk Southern pick-up until loose kaolin had been removed.

15. I knew Lester Kirkland by sight in the 1990's, when he was a conductor for the Norfolk Southern trains. Lester was the only Norfolk Southern employee whom I have ever heard complain about kaolin dust on the railcars' exteriors. Prior to January 1998, I heard Lester Kirkland whine about kaolin dust on a number of occasions. In my experience working with Lester, Lester was a compulsive whiner. Even so, in my experience, when Lester asked for additional cleaning of a railcar, I, or another Grace utility operator or other employee would always comply with Lester's request. The reason for complying with Lester's requests was to keep Norfolk Southern happy. In my experience, no railcar ever left the Grace Plant in an unsafe condition in terms of the presence of kaolin on the railcar.

16. In the 1990's, based on my experience working at the Grace Plant and my experience in particular loading railcars, railcars were loaded with NKC at the Specialty Product Loading Chute in much the same manner as cars were loaded at the Main Loading Chute. Bad weather was somewhat more of a factor because the overhead canopy was less sheltered than the loading shed for the Main Loading Chute. So as a rule of thumb, the Specialty Product Loading Chute was not used in extremely bad weather. Also, because the Specialty Product Loading Chute spout was retractable, it was unusual to have kaolin overrun spill on the railcar tops than if the Main Loading Chute were used.

17. As I mentioned, based on my personal observation of railcars and my work with them, material condition of Norfolk Southern railcars was a constant problem in the 1990's, as

well as in later years. I recall numerous incidents where I personally witnessed Norfolk Southern having taken consignment of a loaded railcar and hauled it away without releasing the brakes.

18. I have reviewed the pictures contained in Exhibit Y to the McNeill Declaration. As a general matter, it is impossible to tell from the pictures of the railcars when they were taken. There are also no identifying marks on the parts of the railcars in the pictures to determine whether the railcars were loaded at the Grace Plant or at one of approximately five other kaolin mining and manufacturing facilities operating along the rail line in 1998. I also cannot tell whether the cars were loaded or empty at the time the pictures were taken. It is also impossible to tell whether the contamination shown is dried and caked kaolin that may have been on the cars for months or even years or whether the kaolin was freshly deposited when the car was last loaded.

19. In particular, the picture on page 2 of Exhibit Y appears not to be of a railcar, but instead of a Norfolk Southern locomotive. The white substance on the catwalk could very well be kaolin, although it is impossible to tell whether it is caked or fresh powder. In my experience, Norfolk Southern locomotives on the rail line often had some deposits of dried and caked kaolin on them.

20. The pictures on page 3 through 8 appear to be typical of railcars loaded at the Grace Plant. The climbing surfaces appear to be free of kaolin, as I would expect. The platform over the railcar coupling is non-skid, in that the metal protrusions are easily gripped. The flat, non-climbing surfaces do appear to be caked with kaolin. The pictures on pages 4-6 all show such non-climbing surfaces. In the picture page 7, the platform grating does not look slippery, as the metal protrusions are clear of kaolin. In my personal experience working directly on railcars with loading operations, if kaolin spilled on any surface during the loading process, the utility

operator or working leader always cleaned it up, either by blowing down the railcar with the air hose or manually with a broom. Of course, if the railcar were already caked in kaolin when it arrived at the Grace Plant, we would not try to clean the caked kaolin off. In my opinion, and based on my personal experience with safe railcar handling procedures, it is unnecessary for personnel to walk on any of those surfaces in order to release a railcar handbrake. That said, it is difficult for me to tell, based on my experience, whether what appears to be kaolin on the various surfaces was fresh powder or old, caked deposits. In my experience, railcars left the Grace Plant in 1998 (and in years before and since) with no fresh kaolin on the top and climbing surfaces and sides. Most of the kaolin remaining on loaded railcars leaving the Grace Plant was generally dried and caked kaolin that had been present on the railcars when Norfolk Southern delivered them to the Grace Plant. Also, in my experience, to the extent that the kaolin was fresh powder, it may well have come from leaks in the railcars during transit after leaving the Grace Plant (or from whichever kaolin producer at which the railcars were actually loaded).

21. The picture on page 9 in Exhibit Y has writing on the railcar. But this writing does not present any characteristic by which I can identify whether the railcar may have originated at the Grace Plant—or even whether it was loaded at the time.

22. There are several pictures of the Grace Plant in Exhibit Y, beginning on page 11. The date stamps on those pictures indicate that they were likely taken on December 19, 2000, almost three years after Mr. Kirkland's alleged accidents. There is a longstanding Grace policy that that was routinely enforced by the plant manager, that did not permit any pictures to be taken at the Grace Plant without the plant manager's express permission. Any non-Grace employee taking pictures on that date would therefore have had to trespass on the Grace Plant in order to take the pictures.

23. I have reviewed the Sharpe Declaration. I understand from conversations with others that the Sharpe Declaration was filed by Norfolk Southern in support of its claim.

24. There are a number of misstatements and inaccuracies in the Sharpe Declaration. In particular, paragraph 5 states, “[o]ften, the layer of kaolin powder covering the railcar would be at least several inches thick, if not more.” This is not accurate. In 1998 (and before and since that time), Grace personnel routinely in my experience removed all fresh kaolin powder from the tops, sides and the flat climbing surfaces of the railcars. Also in my experience, caked and dried kaolin generally present on the railcars when they were delivered by Norfolk Southern was generally not removed, nor was it removed from non-climbing surfaces, because personnel typically did not walk on those surfaces. In my experience, railcars often leaked due to their poor material condition at delivery, so kaolin would often escape from those leaks when the railcars were in transit after having been consigned to Norfolk Southern for transshipment. Moreover, in my experience as a utility operator, working leader and now safety coordinator, the statement, “[n]o one at Grace supervised the loading of the hopper cars, which generally led to their overfilling,” is inaccurate, both in reference to January 1998, as well as the years before and since then. The working leader supervises the utility operator in filling each and every railcar. I have personally worked as a utility operator and as a working leader. Finally, based on my experience as a utility operator and as a working leader, I can state that the several references to “overfilling” railcars is inaccurate and misleading. Particularly when using the Main Loading Chute, kaolin overrun occasionally spill onto the top of the railcar. That does not mean the railcar was “overfilled.”

25. In paragraph 6, the Sharpe Declaration states, “it was widely known that Grace was the worst of our kaolin customers at overfilling railcars.” Based upon my 28 years at the

Grace Plant, this statement is not accurate. Grace had in 1998 (and still does to this day) enjoyed for many years an excellent reputation as a safe and compliant workplace, regularly inspected by MSHA. The Grace Plant has not been cited for railcar safety violations. Finally, I and my fellow Grace employees have always taken great pride in ensuring that the Grace Plant was a clean and safe workplace. In my experience, I have never seen a railcar leave the Grace Plant where spilled kaolin presented a safety hazard. As I have said in several places in this Declaration, these statements are based on my personal knowledge from working in a variety of jobs at the grace plant and performing the tasks as issue, and also because because of my current duties as safety coordinator which requires me to be familiar with the history and experience of the Grace Plant in regard to safety and cleanliness--which is a party of safety.

26. I have reviewed the Conley Declaration. I understand from conversations with others that the Conley Declaration was filed by Norfolk Southern in support of its claim.

27. There are a number of misstatements and inaccuracies in the Conley Declaration.

In particular, paragraph 6 states:

At the Grace Facility, Grace would load railcars with Kaolin at two locations, depending on the grade of clay being loaded. Kaolin is usually shipped as a powder, as crushed clay or in a liquid slurry. The first location was out in the open, but it was only used when exposure to weather was not an issue. The second location was under a covered shed, and Grace used it for most of its loading needs, especially on rainy days. Both locations relied on a spout to load the kaolin into the railcars.

As discussed above and based on my experience as described above, in 1998, Grace loaded approximately 60 railcars per month with its regular grade of kaolin at the Main Loading Chute, which was a covered shed. Grace loaded only NKC at the Specialty Product Loading Chute, at the rate of approximately three railcars per month. The Specialty Product Loading Chute was not used in extremely bad weather, but could be—and was—used during bad weather because

there was an overhead canopy to shield most precipitation. Grace has never shipped crushed clay or liquid slurry kaolin. It only ships kaolin in powder form.

28. Contrary to the assertions made in paragraph 8 of the Conley Declaration, Grace has never "routinely overfilled" railcars. I make this statement based on my personal experience as described above. To "overfill" railcars would have been inefficient and costly, not to mention unsafe. Railcars were also not covered several inches thick with kaolin. As discussed above, railcars on which fresh kaolin was spilled (whether due to occasional overruns or otherwise) during the loading process were routinely cleaned with a high-pressure air hose. As a general matter, railcars consigned to Norfolk Southern for transshipment often had caked and dried kaolin on them that was present when Norfolk Southern delivered the cars.

29. The statement in paragraph 9 of the Conley Declaration "the Grace Plant had developed a reputation among Norfolk Southern personnel for habitually overfilling the railcars and creating some of the most unsafe working conditions along the entire line," is also inaccurate. As also discussed above and based on my personal experience and observation as described above, the Grace Plant enjoyed an excellent reputation in the industry as a safe and compliant workplace, and it was regularly inspected by MSHA. MSHA also never cited the Grace Plant for any railcar safety violations.

30. Moreover, to be clear, and based on my experience and personal observation, Grace employees set and released the handbrake on each and every railcar that the Facility loaded with kaolin several times during the loading process, both in placing the rail car at the relevant loading chute and then moving it to another part of the siding to make way for the next railcar to be filled. To the best of my knowledge, there was never a single reportable incident

involving injury from a fall on slick kaolin during my 28 years at the Grace Plant, nor was there a single reportable incident involving injury from setting or releasing railcar handbrakes.

**[nothing further on this page]**



31. Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury of the laws of the United States of America, that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: March \_\_, 2017

David Drumming Jr 3-6-2017

David Drumming, Jr.  
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